UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, et al., Plaintiffs; vs. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants.	1:20-CV-876

OCTOBER 22, 2020
MOTIONS HEARING
BEFORE THE HONORABLE JOE L. WEBSTER
UNITED STATES DISTRICT MAGISTRATE JUDGE

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(Thursday, October 22, 2020, commencing at 10:02 a.m.)

THE COURT: Good morning everyone. If everyone is ready, we are going to proceed in the matter of *North Carolina A. Philip Randolph Institute, et al., versus North Carolina State Board of Elections, et al.*

I will first have the attorneys for the plaintiffs and then defendants to introduce yourselves, and then we will proceed further.

MR. YOUNGWOOD: Good morning, Your Honor. Jonathan Youngwood for the plaintiffs.

MR. BROWN: Good morning, Your Honor. Mitchell Brown for the plaintiffs.

MS. RIGGS: Good morning, Your Honor. Allison Riggs for the Southern Coalition for Social Justice on behalf of the plaintiffs.

THE COURT: All right, thank you.

MR. STEED: Good morning, Your Honor. Terence Steed, Special Deputy Attorney General with the North Carolina Department of Justice, on behalf of the defendants.

MR. COX: Good morning, Your Honor. Paul Cox with the North Carolina Department of Justice.

MS. VYSOTSKAYA: Good morning. Olga Vysotskaya for the North Carolina Department of Justice.

THE COURT: Thank you.

My thought this morning is that we would proceed as

follows. If you have any thoughts about it, I will be happy to hear you on it, but I would -- I am going to have the plaintiffs to argue first for 30 minutes or so. We would then take a ten-minute recess.

I know that if you are like me, you have found that it takes a lot of energy and breath to talk through the mask and so forth, but -- and then we would have the defendants argue for 30 minutes. And then we will then have the plaintiff to come back for 15 or 20 minutes and the same for the defendants. And we will go from there.

All right.

Thank you, Madam Court Reporter, for being here today, and court security and anybody else that's present.

MR. YOUNGWOOD: Thank you, Your Honor, and good morning. Thank you for making time for this important hearing. Just as a matter of housekeeping, I wanted to note we were in communication with the Clerk and we were told that the Consents would be sent out in connection with -- which the Court would have authority for the matter. Those were not received and so they have not been returned. But with that, I will proceed with argument.

As Your Honor knows, this lawsuit challenges a racially discriminatory and unconstitutionally vague North Carolina statute that criminalizes voting by individuals with felony convictions, who mistakenly believe they are eligible to

vote.

Virtually every other election crime punishable as a Class 1 felony in North Carolina requires intent. This one does not.

This unjust and unconstitutional law was originally enacted with racially discriminatory intent and continues to disproportionally impact black individuals in North Carolina. Recent high -- high-profile prosecutions under Section 163-275(5) of individuals who mistakenly believed they were eligible to vote has caused widespread fear of voting in the state.

We are here, Your Honor, this morning on the preliminary injunction. The requirements are -- under the law are clear. Likelihood success on the merits, irreparable harm, balance of hardship, and whether or not the injunction is in the public interest.

I want to address each of the four factors. I will do the third through fourth first, and then I will return to the merits, which is more focused with the discussion.

THE COURT: Well, let me -- and I meant to say at the outset, before we get into the preliminary injunction, the issue concerning subject matter jurisdiction and standing. So I think that would be in order to hear that first.

MR. YOUNGWOOD: I am happy to go to those topics, and then I will come back, Your Honor.

So the defendants have raised *Ex Parte Young* and immunity. The standard -- so I will address *Ex Parte Young* first and then the standing of the plaintiffs to bring these claims second, in response to Your Honor's question.

Ex Parte Young requires that there be some connection between the defendant and the enforcement of the alleged unconstitutional law. That standard is well-established here with respect to both the State Board of Elections defendants and the Attorney General.

As Your Honor knows, the State Board consists of five members appointed by the Governor. These members appoint an executive director, who serves as the state's chief election officer. They are named as defendants.

The duties of the State Board and their involvement with the -- this unconstitutional law is -- this unconstitutional strict liability voting law are multitudes. Under North Carolina Statute 163-278, it is the duty of the Board of Elections and the district attorneys -- the Board of Elections being here, to investigate any violations of this unconstitutional law.

The State Board and the DAs can both subpoena witnesses and get help from the State Board of Investigation in this process. The State Board is empowered to furnish the district attorney a copy of its investigation.

As discussed in the papers, following an audit of the

2016 election the State Board investigated violations of the strict liability law and referred cases to the DAs for prosecution. The State Board provide the district attorneys with all the necessary documentation to prosecute. In the letter, I'm referring to Exhibit 3 to our papers, to certain DAs, the State Board encouraged prosecution.

When certain prosecutors declined to bring charges, the State Board wrote a letter proposing changes to the active felon notification process to facilitate prosecutions and convictions.

The standard under *Ex Parte Young* is easily satisfied for the State Board defendants.

It is also satisfied for the Attorney General. The State Board can refer violations of the strict liability law to the Attorney General for further investigation under 163-22(d).

If a DA requests that the Attorney General prosecute in the first instance, the Attorney General is empowered to do that under 114-11.6. The Attorney General can consult with DAs on prosecutions at their request, under Section 114-2(4). And significantly, the Attorney General is solely responsible for criminal appeals flowing from the enforcement of this unconstitutional statute.

So, but for the existence and the role of the Attorney General, none of these cases could go through an appellate process.

And finally, the Attorney General is empowered to issue advisory opinions upon request on this statute as on many others.

For those reasons, Your Honor, both on sets of defendants who are named today, are -- are qualified or are subject to these sections under *Ex Parte Young*, and the limited immunity argument does not apply.

About standing, Your Honor, standing are three elements and I think the parties are agreed on this, injury in fact, that it is fairly traceable to the challenged conduct of the defendant, and it is likely to be redressed by a favorable judicial decision. Each of those elements are easily satisfied here.

Our plaintiffs are organizations whose core missions include encouraging voting through voter registration and get-out-the-vote activities. Investigations and prosecutions under the strict liability law have a chilling effect causing eligible voters with criminal convictions to be afraid to vote for fear of prosecution. This chilling effect impedes plaintiffs' core mission which is outlined in their declarations. To counteract this chilling effect, the plaintiffs have diverted resources from their voter registration and get-out-the-vote efforts to educate and reassure voters.

This is the standard type of standing that appears in

voting cases such as this. We've cited many cases on -- in -- in our briefs, but I would refer the Court to the *Common Cause* -- *Common Cause of Indiana* case v. *Lawson*. It is a Seventh Circuit case and there are others.

I will go on to traceability, the second element. Traceability is a fairly easily met standard here. It requires just some type of nexus between plaintiffs' injuries and defendants' conduct or authority.

Plaintiffs' injuries: the expenditure of resources, the expenditure of efforts to counteract the fear of voting is traceable to the threat of enforcement of the strict liability law.

And in terms of redressability, Your Honor, it is not required that plaintiffs demonstrate that a favorable decision will relieve every possible injury they are suffering. We need only show that we would benefit -- the plaintiffs would benefit in a tangible way from a Court's ruling on this motion in our favor or a ruling, frankly, on the case in our favor.

Here, a preliminary injunction would benefit plaintiffs by substantially reducing the threat of prosecution, reducing the chilling effect and allowing plaintiffs to spend less resources needed to reassure and educate voters that they will not be subject and they are not at risk for prosecution from this law.

If the State Board, for example, ceased investigating

violations of the strict liability law and ceased referring the cases to DAs, there would be no cases. The AG would not be able to prosecute violations of the strict liability law at the DA's request.

If this motion were granted, the AG could not investigate violation -- violations referred to it by the State Board pursuant to 163-22(d). The AG could not defend convictions on appeal.

Those are the elements of standing.

Connected to that, Your Honor, there is argument in plaintiffs' brief about why other parties are not here in some way that relates both, I think, to the *Ex Parte Young* arguments and the standing arguments that we just discussed. And the defendants point to the DAs of the state and asked why they are not also here.

Your Honor, they would be proper parties, but that does not mean they must be parties to this case for plaintiffs to get the relief that they seek.

There was reference to Federal Rule 19(a)(1) in terms of the definition of necessary party. And under that, the DAs are not necessary parties to this.

The issue under Rule 19 is whether plaintiffs can get the complete relief they seek from these defendants, not from some potential other defendants. And so while the DAs would be proper parties, they are far from necessary parties.

The relief we seek that neither of these two sets of defendants continue to take actions to enforce this law is available absent the presence of the DAs.

Your Honor, unless you have questions on those two or three --

THE COURT: Is it --

MR. YOUNGWOOD: -- issues --

THE COURT: Is it the case that district attorneys could possibly get information from someone other than the state department of elections?

MR. YOUNGWOOD: Your Honor, I can't preclude that, but that is not, based on the pleadings and the facts presented to this Court, how that has historically worked and historically here speaking really of the last several years directly, where, you know, the Board of Election conducted an audit; identified hundreds of potential violators and made referrals directly to DAs.

The DAs, in turn, at least in two counties in very prominent sets of prosecutions proceeded, based on the information given to them by the State Board. It is that, among others, type of act that we are seeking to bar from happening in this upcoming election.

I also believe, Your Honor, that while there could be suspicions on -- of other individuals, hypothetically again, there has been no presentation of that. To do the prosecution

they would still need the information from the State Board of Elections to establish that there was actually a violation. So I don't believe the DAs could do it alone.

Your Honor, with that, I will return to the -- to the PI standards and walk through those reasonably briskly but -- but of course, if you have questions on any.

The first element, Your Honor, is likelihood of success on the merits. And I think one of the most remarkable things about the opposition about this hearing is on one of the claims there is no -- no briefing whatsoever of substance presented. That is, the equal protection claim.

And so I think, at least for purposes of this hearing, that needs to be conceded. I suspect, Your Honor, it will be conceded throughout the case because there really is no defense on the equal protection claim.

As we outlined in our papers, the law we are challenging and I know they raised, well, why did you wait 120 years to challenge it, but Your Honor, the law arises out of the past and was enacted in a manner that, I think there is no challenge to the conclusion whatsoever, that it was enacted with a racially discriminatory intent.

Moreover, and more recently, and this gets to why we are here now, it has been applied in a racially -- a racially inappropriate manner. And if you look at, for example, the number of individuals that the State Board, in its 2016 audit

found had potentially violated the law, 441, 66 percent of them were black.

And so a law that was enacted long ago with a racially improper intent has the significant risk today, and in fact, is today being applied in a racially disparate manner.

On the void for vagueness argument under equal protection, Your Honor, there is some argument -- again, I would submit to you it's rather tentative and this law is inherently void. The voidness in law is related to directly the fact that it is a strict liability law because if you have a law that isn't strict liability, even if the statute has some problems, you still have to prove an intent element.

And the problem with this law is that when you strip away the intent element somebody can, as we began this -- we began our papers and we began our complaint, be convicted with no knowledge whatsoever and no intent to violate the law.

They can be convicted of a Class 1 felony on a mistake, mistaken behavior.

To interpret this law you have to look as the defendants did in their papers. You have to look at the law 163-275(5), you then have to look at the North Carolina Constitution, but there is no cross-reference in the law to it, so you have no way of doing that. And then you have to look at North Carolina law 13-1(1), which defines the term "rights of citizenship" and refers to unconditional discharge.

So you have to make this three-way combination of words to get to an answer that if you don't get right and you don't even know that you are not getting right, you are convicted of a Class 1 felony.

The statute is void for vagueness and it is a violation of the equal protection clause. And again, I submit to you that there is no -- no argument at all on -- I'm sorry, I said, void for vagueness, under the due process clause not the equal protection clause. There is no argument at all on equal protection, and the due process argument is without merit and it is not in, frankly, any detail or serious way presented here.

So when you go through the four elements of the PI, you begin, where you rarely do in PIs, with an incredibly strong argument on the likelihood of success on the merits. And I believe, Your Honor, under any balancing of these four elements that influences the reading of the other three, which in any event, independently are satisfied.

So the second element is irreparable harm. Well, the irreparable harm here to our clients is what they are doing between now and the election and what they have been doing. And the existence of this law and the knowledge that it could be prosecuted as it was in 2016 continues every day to divert attention, resources from our clients as they seek to pursue their core mission.

On the third element, Your Honor, balance of the hardships. On the plaintiffs' side, it's this irreparable harm that's going to continue through the election, that has been continuing and that can't be fixed. That is the irreparable harm, but it also weighs on balance.

On the defendants' side, one of their arguments that I haven't addressed in detail -- I'll be happy to if they raise it during rebuttal -- is that they said this isn't a priority. The State Board of Elections said that enforcing this particular law -- I should say that differently. They said other things are their priorities and they haven't listed this as a priority.

Well, Your Honor, that is not enough for us because the fear is still there. Just because something isn't a priority, it doesn't mean you are not going to do it. They say they won't do it when the PI is over, that is what we are seeking as relief. But for them, the hardship isn't there. There is no hardship in not enforcing an unconstitutional law, particularly one that you've said isn't the priority.

And finally, Your Honor, public interest. Well, it's in the public interest, it's in everyone's interest for every eligible voter to vote. And this law and what the PI seeks to prevent is chilling, that it is interfering with what our clients are trying to do to give people the opportunity to vote. Help people, to point them in the right places, it's

diverting resources.

And so the public interest would say don't enforce an unconstitutional law that will certainly result in certain people, who have the right to vote, not voting in this election.

Your Honor, with that, I'm not -- I haven't kept track of my own time, but I'll pass and look forward to addressing you again.

THE COURT: All right, thank you.

Mr. Steed.

MR. STEED: Thank you, Your Honor.

I will begin, as Your Honor requested, with the procedural standing arguments that include limited immunity. I'll start with the limited immunity.

The plaintiffs have put forward an analysis test that draws from circuits around the country and ignores primarily the test that is applied in the Fourth Circuit, which may be found in *McBurney*, *McBurney versus Cuccinelli*.

In *McBurney* they require -- they required a special relationship, as they said, but that special relationship is more narrowly defined in the Fourth Circuit. It's defined as a proximity to and responsibility for the challenged action. And in *McBurney*, that court stressed that it requires specific statutory authority to initiate proceedings.

In this case, that is precisely what they are missing

because the specific statutory authority for this particular crime can be found in 163-278. 163-278 does state that the State Board of Elections may investigate, shall investigate and authorizing power to subpoena, compel attendance for purpose of making those investigations and they are authorized to call upon the State Board of Investigations to furnish assistance. But at each step in that statute, it's the State Board and district attorneys.

District attorneys can investigate. District attorneys are empowered to subpoena and compel witnesses. The district attorneys may call upon the State Bureau of Investigation for additional help, if their offices are not capable of doing it.

And finally, the actual enforcement of the statute falls only to district attorneys, who are the only parties empowered under this specific statute that authorizes prosecutions for this crime. They are the only ones who shall initiate and prosecute any violations of this article.

When that is put up against the general authority in 162 -- 163.2(d) which states that general -- general investigations of the State Board can be referred to the Attorney General's office, the specific statute controls under statutory construction. And because that is the specific statute, then under *McBurney* it is not the AG that is authorized under the specific statute to prosecute.

So they are not the proper defendants because they are not the one prosecuting.

Additionally, there is absolutely no authority anywhere for the State Board to prosecute anything, much less this crime.

They are called upon to investigate their specialization in elections. That is an investigation that would happen whether this statute was enjoined or not because they have a duty to make sure that eligible voters are voting and ineligible voters are not voting.

Additionally, the reference to the special prosecution statute, 114-11.6, this does not create independent authority for the Attorney General to prosecute crimes. The Attorney General cannot go off and prosecute this crime if he wants to. It requires a request from a district attorney to do it, and then the Attorney General has to agree to it.

Based on our own research in our office, that has never occurred. The pros- -- the Attorney General has never prosecuted this and he has never been requested to prosecute this.

The reference to the Attorney General's non-delegable duty to defend the state in criminal appeals. Again, if a prosecution happened under this crime and the conviction happened under this crime, and if it was appealed, then it would fall to the Attorney General to make the decision on how

that defense would happen.

But a review of Lexus and all of the cases in the Court of Appeals and North Carolina Supreme Court appeals, that's never occurred in the 120-year history of this statute.

Additionally, even if the Court were to find a special relationship existed between the defendants and this action -- between the defendants and the challenged state action, *McBurney* requires that they also must have acted or threatened to act, not just the hypothetical that they could.

Again, the Board of Elections has never prosecuted this crime because they can't prosecute any crime. The AG has never prosecuted or threatened to prosecute, and he has no authority to prosecute this crime.

Finally, and in connection with this because it follows along as almost a third level of this test, under Section 1983, there must be an ongoing violation in order to be -- for the individual defendants to be here, for this plaintiff to move forward. There is no ongoing violation.

The only -- the only reference they have to anything historical done by either of these is the audit from 2016 election by the State Board. And in the time period between then and now, an entirely new State Board has been seated, and the 2019 policy outlining the priority of investigations was put out publicly to -- to let everyone know and to let their investigators know what the focus will be.

And they provided a list that focuses on election officials, but primarily it is focused on culpability. And nowhere on that list is a reference to strict liability for this crime.

Moving to the lack of standing. We do agree that an injury in fact -- there must be an injury in fact. They have argued that they are trying to seek organizational standing based on what is essentially an argument that high-profile prosecutions under the statute have created a chilling effect frustrating their purpose.

Now, the purpose of having eligible voters register and vote is noble, it is righteous, and we commend them on that. However, the problem with the frustration of that purpose is not these defendants that have frustrated it. Even if everything they say about the organizational injury is true, the only cases that they can cite to are district attorneys in Hoke County and district attorneys in Alamance County that prosecuted this.

Even then, their injury is not on behalf of those non-parties who were prosecuted. They must show their injury, and what they are focused upon is non-parties who have told them that they are concerned about future prosecution by district attorneys for an act they haven't committed yet and by people who may or might -- may or may not even violate the crime statute by voting.

Presumably they are not advising former felons who haven't completed their conditions to vote because that would be in violation of the statute. So the people they are concerned with are people who are not voting but are eligible to vote. In such a situation, allegations of future injuries, they don't create standing under *Whitmore v. Arkansas*.

Additionally, their -- their definition of traceability is a bit looser than -- than it should be.

This is a closer argument to causation. What *McBurney* says is causation is a traceable connection between the injury complained -- between the injury and the complained of conduct of the defendant. And I don't want to hammer the same factual arguments over and over, but there was no conduct of these defendants that caused this injury. They didn't prosecute this crime. Local district attorneys did.

Even the outcome of the investigation, the audit of 2016 in the letter that was -- that was presented to district attorneys and to the state from the Board of Elections about this happened, the summary just provides a list of things that could be done to prevent it from happening in the future.

It talks about working with public safety and the courts, increase data-sharing, helping felons understand what is happening when they are -- when they are prosecuted and found convicted so that -- so that the possibility of people who are out there and don't realize that they might commit this

crime is lessened to the greatest extent possible.

There is no focus upon prosecution. It is quite the opposite.

Finally, the redressability arguments are -- are strong on the behalf of the State. They might not have -- they make the argument that DAs are proper parties but not required as necessary parties. They are -- the redressability argument is precisely why they are necessary parties.

They say that if -- if the investigation and referral by the State Board were enjoined, there would be no prosecutions. A reading of 278 shows that that is absolutely not true.

278 empowers district attorneys to do exactly what the State Board does. If this Court were to enjoin this and stop the State Board from doing its investigation, which would also, I think, enjoin them from being able to just make sure that ineligible voters didn't vote as part of their general duty to ensure the election was done properly, that wouldn't stop district attorneys from doing exactly the same thing, even district attorneys that have minimal resources because they can call upon the State Bureau of Investigations and use their additional resources.

Your Honor asked a question about whether district attorneys could obtain this information otherwise. Not only do they have subpoena power under the statute so they can subpoena

this information from the State Board, all of these records are public records of the State Board. Anyone can go online right now and look up a registered voter's name and see if they voted. In a couple of weeks that will show who voted in this election.

Additionally, there is nothing stopping anyone from going online right now and looking up on the Department of Public Safety's offender information reports, which shows everyone's criminal history but also active sentences for those who are in prison and active sentences for those who are outside of prison.

So any district attorney, with just a computer and the Internet, could do this as the starting point for an investigation.

Additionally, just the concept that they would enjoin investigations of -- which essentially are creating public records, the investigations really must happen, whether they are referred out for criminal conduct or not, just for the safety and integrity of the election that then create public records, and somehow the district attorneys would not be able to subpoena those records. I'm not sure there's ever been or any case law that would support a preemptive injunction against non-parties to obtain public records.

Finally, in addition to this, just one other point that they -- they made that I think is important to note. If

the Attorney General is enjoined from prosecution, he has no authority to tell district attorneys not to prosecute. There's no -- there's no statute that places him as a higher -- in a hierarchal organization with the state's district attorneys. They are all independently elected officials.

I will turn now, Your Honor, to the lack of imminent and irreparable harm.

I think it important to note that while they have made a strong argument on behalf of those who have been prosecuted under this law following the 2016 election, those -- those people are not parties here and their prosecutions are not part of the -- of membership standing or the organizational injury.

The organizational injury is entirely made up of non-parties who fear a potential prosecution. And while there is a -- it is an argument that is -- I think has weight to it, that is not an actual argument they are making. It is just additional surplusage of facts that don't actually have any bearing on this analysis.

And then one of the points that we had in our argument, which I would like to hit again, is that this reliance on what third parties may or may not do is too attenuated to support irreparable harm to these plaintiffs, and that can be found, Your Honor, in *Whitmore v. Arkansas* and *Clapper versus Amnesty International*.

I will now turn, Your Honor, to the due process claims. I think -- I think that the due process on void for vagueness truly struggles to make its point. There is nothing vague about this statute. It's simple. It's not terribly long. It says that it is unlawful for any person convicted of a crime, which excludes them from the right of suffrage, to vote in an election without having that right restored under a method provided by law.

Would it perhaps be clearer if it directly cited to 13.1, the law that was passed to automatically restore their rights after they completed their sentence?

I think that would be nice, but there is no requirement for that, or the fact that we reference 13.1, the statute that specifically restored rights as a way to help explain this. There is -- there is no law that says that other statutes can't help explain things or that other cases can't help or that even the agency could help define what that means.

In fact, under *Kolbe v. Hogan*, it explains that there are -- that these are the exact type of things that can be incorporated into the analysis of a statute to save it from criminal statutes being unconstitutionally vague.

The citation is 813 F.3d 160 at page 191. That's a Fourth Circuit case, Your Honor.

THE COURT: What page was that?

MR. STEED: Page 191.

THE COURT: All right, thank you.

MR. STEED: Your Honor, it's precisely why the argument makes sense to look at the restoration of rights argument -- the restoration of rights statute which provides again, the plain language of unconditional discharge.

The argument in their initial moving papers that unconditional discharge is now vague and that that is somehow making people -- made it difficult for people to understand whether they are eligible or not to vote. I struggle to see how unconditional discharge is difficult to understand because it literally just means discharged without conditions. If a person has completed their probation and they are released, they don't have any more court appearances, they don't have to keep up with their parole or probation officer, then they are released without conditions.

It -- it seems to me the plain language of that statute, the plain language of the other statute are quite clear, don't present a void for vagueness claim.

Just briefly, just to reiterate our position on equal protection claim. We are not conceding the merits of the equal protection claim. It is just as opposed to the due process argument, which is an entirely legal challenge to the face of the statute, the equal protection claim is heavily fact-intensive. It would require -- it will require time. It will require diving into the archives of both the state and of

newspapers, the subsequent amendments, and also the recent consideration of amendments.

They -- it's not that this statute has laid dormant for 120 years without consideration. It -- this particular issue of intent has been brought to the floor of the General Assembly twice in the last three years. It even made it out of the House once.

So in order to consider whether there is the same type of intentional discriminatory effect that may very well have been there and in the 1890s when this was initially considered perhaps, it would require more time and more effort to find out the exact reason why such a statute remains and the intent and the understanding of it now from -- either from subsequent amendments that happened over the years, in any sort of record, but also from the legislature today.

So our contention is that it simply is not appropriate or we cannot make that argument right now and it is not appropriate to find on the merits on that particular argument as there is no time to do this and this was brought at a late hour and with no time to do that for emergency ruling.

Turning to balance of the equities. Generally, when a state is enjoined from enforcing one of its own laws, that visits a harm upon the state. That comes from *Maryland v. King*, 133 Supreme Court 1, page 3.

Additionally, the timeliness of this application also

goes to the balancing of the hardships. The statute is 120 years old. They offer no explanation for why now at the end it must be urgently enjoined by this Court. There is no explanation for why it wasn't brought ten years ago or 20 years ago or earlier.

Even if the explanation was that they were not aware of it or that its chilling effect did not occur until 2018 when the prosecutions happened, counsel for the plaintiffs was counsel the defendants in their prosecutions in 2018, as they note in the complaint at paragraph 52 and footnote 74 and 75, in which they raise the exact same equal protection and due process claims in state court, that ultimately were -- resulted in dismissals of these particular charges either through plea or through -- in one of the cases where it was dismissed outright and new charges were brought that I presume relied on intent.

So there is no explanation for why when that happened in 2018 the case wasn't brought, if they were aware of it. And additionally, if they were aware of it in 2018, and it happened and they thought it was a one-time thing, it happened again in 2019 in Hoke County and they still didn't bring a claim. At the same time the state action happened, the community -- CSI, Community -- (turns to co-counsel) --

MR. COX: Success Initiative.

MR. STEED: -- Success Initiative. Thank you.

But that was filed over approximately a year ago. Nothing in that case prevented them from filing this case then. Instead, they waited until weeks before the election to seek an emergency ruling. That timeliness goes to the balance of the hardships, but it also goes to the irreparable harm.

It's hard to accept an argument of irreparable harm that the organization was feeling throughout this whole time when they saw no need to bring suit until the very last minute.

If it was truly an irreparable harm and they were out in the field registering people to vote and were running into this repeatedly since the time of the high-profile prosecutions by district attorneys in 2018, it clearly wasn't very irreparable to them since they didn't bring suit for nearly two years.

Finally, one -- one argument in relation to the equities in that this would not be difficult for the state defendants.

They are correct that there is no action or threat of an action on behalf of the state defendants, but the priorities of the investigation of the State Board, that doesn't support the plaintiffs' argument that this Court should enjoin it because they weren't going to do it anyway. It supports the defendants' argument that the Court should not be enjoining actions that have not happened. There is no reason why the federal court should be stepping into state law for something

that is not actually a threat.

Unless Your Honor has any questions.

THE COURT: Is it the defense position that all of the district attorneys in the state of North Carolina would have to be brought in as defendants in order for plaintiffs to obtain relief?

MR. STEED: The relief that they are seeking, yes. To address what they are particularly seeking which is that their -- the people that they interact with in the field feel threatened for prosecution, absolutely.

The threat of prosecution is not coming from the state defendants. It comes from local district attorneys. And were you to enjoin the state defendants, as I said, under the statute, the district attorneys would be free to go about doing this.

And the fact that what they are specifically referencing is the chilling effect from the 2018 and 2019 prosecutions by district attorneys speaks to that. The state defendants did not -- did not prosecute those. In fact, it was local district attorneys. Local district attorneys are free to continue doing that, whether this Court enjoins or not, without them here as parties.

THE COURT: Tell me again why you believe the state believes that the statute is not unconstitutional.

MR. STEED: The due process argument, Your Honor. I

think that the plain language of the statute is comprehensible under -- let me see if I have the cite for it, Your Honor. Sorry, I don't have it here in my notes, but it is in our brief.

The plain language of the statute is comprehensible. What is required is when a normal person, an ordinary person reading the statute, understands what it means. It is not a long statute. It is not speaking of multiple independent elements or acts. It is very simply are you completely -- have you completed your active sentence, whether that was all done in custody or whether you had a probation or parole post-release sentence and, if so, then you can vote. But if you have not, then you are not eligible to vote until your rights are restored, and it is a felony to do so.

I think that the plain reading of the statute is clear, and it is not void for vagueness on those grounds.

THE COURT: All right, we will take a 15-minute recess and then come back.

(A recess was taken from 10:47 a.m. to 11:10 a.m.)

THE COURT: All right, I'll give counsel for plaintiffs to -- their opportunity to address the Court.

MR. YOUNGWOOD: Thank you, Your Honor.

And I am going to move around through my colleague's arguments. But I want to start with a general proposition that much of the argument, certainly concerning the elements, but

frankly, also the standing and the *Ex Parte Young*, seem to revolve around the statement that you don't know we are going to do it again or we won't be doing it again, or it is not our priority, or where are the instances of it being done now.

And that all really circles around the idea that sort of a trust us and as long as, you know, good people who don't want to enforce the strict liability voting law are making the decisions, everything will be fine. But that's not what the case is about.

The case is about ensuring that our clients aren't diverting resources to try to help people interpret an inherently unconstitutional law that violates both the equal protection clause, and that is under due process clause incredibly vague and difficult to read. And that it requires lawyers, frankly, to interpret it, as counsel did a very nice job. But counsel is not the typical voter.

I want to look at a few of the cases that were cited in the *Ex Parte Young* discussion and perhaps start on -- with the *Limehouse* case, which is the Fourth Circuit case that counsel cited that does apply *Ex Parte Young*. But there is nothing in *Limehouse* that in any way narrows *Ex Parte Young*, nor frankly, could it.

It starts by citing *Ex Parte Young* and then says -- and then cites the very same standard I cited to Your Honor where a state law is challenged as unconstitutional, the

defendant must have some connection with the enforcement. That's on page -- let me get that -- 332 of the Federal Reporter decision.

I'm skipping some sentences, but going to the end of the discussion in that paragraph -- and this is in the context of the director, who is at issue, the director of an agency, the director's connection to the project -- and I am skipping a word or two, need not be qualitatively special -- rather the special relation, that's the words that my colleague read under *Ex Parte Young*, has served as a measure of proximity to and responsibility for the challenged state action.

Well, Your Honor, that's what we've established with respect to the DA and with certainly the State Board of which there were very few arguments about.

I'll go next to the *McBurney* case, which I think was cited concerning the Attorney General. And I am looking at page 400 of this decision. The *McBurney* case is wholly distinguishable from our case. It concerned the Virginia Attorney General, I should say, not the North Carolina Attorney General and that, frankly, is the distinguishing part of that and the law at issue.

What the Court says is that we agree with the Attorney General. First, he does not have a specific statutory duty to enforce the statute at issue against state officials.

Your Honor, here we have pointed through the

statutory duties that this Attorney General does have with respect to this statute, and I won't recite all of them again. But perhaps most easily accessible and in contrast to this, but for the Attorney General there can be no defense of a criminal conviction under this strict liability voting statute. And so that completely distinguishes this case, this pleading, this statute and the Attorney General's role from *McBurney*.

Your Honor, there wasn't -- they are not arguing about -- about the Attorney General. There was almost none about the State Board of Elections. I won't repeat everything I said earlier, but it is really quite clear that the State Board of Elections has had -- and again, I guess I can't tell you exactly what they will do tomorrow -- has had direct involvement with the enforcement of this law.

And again, I will refer Your Honor to Exhibit 4 of -- I'm sorry, Exhibit (looks through documents) -- 3, which is the August 12, 2018, letter sent to Hoke County from the North Carolina State Board of Elections. And I won't read through the three-page, very detailed letter, but this is, I think, fairly read as a plea for prosecution.

And so that is the type of thing that our clients are dealing with when they deal with people in the community who are coming to them to figure out how to vote.

I want to briefly go to the timeliness argument because I don't believe I addressed each of the points that

counsel addressed when I first spoke.

Your Honor, could we have eliminated more irreparable harm if we had gotten before Your Honor before October 22? Well, yes, we could. But irreparable harm continues.

We've explained in our papers this case was filed in the wake of the *CSI* decision in early September. It was filed within weeks of that decision and it was filed after our clients concluded that the very harms that had been experienced previously, which is the fear of voting that our clients have to deal with to try to explain to people who can and who can't vote were still present. That fear of being prosecuted under this law was still present post-*CSI* decision.

And so that is the explanation, the notion that it should have been brought a hundred years ago. I don't think that was a serious argument, Your Honor. I'm telling you why it was brought now.

The irreparable harm continues and will continue every day that this strict liability law remains a threat of prosecution on people that our clients seek to serve.

And on the DAs, Your Honor, and I think there was a statement from counsel that we have to name every DA to seek the relief. Well, first, Your Honor, I will cite you in the *Woman's Medical Corp versus Voinovich* case. It's a Sixth Circuit case that is cited, but I will also give the cite. It's 130 F. 3d. 187.

THE COURT: It's what, one --?

MR. YOUNGWOOD: 130 F.3d 187, Your Honor.

THE COURT: I think there is one district attorney in that case, isn't it?

MR. YOUNGWOOD: There -- there is one prosecutor.

THE COURT: Prosecutor.

MR. YOUNGWOOD: You are correct, Your Honor, but the point, if you take the logic, their logic to get everyone, you've got to get every one, that's incorrect, Your Honor.

If Your Honor were to rule that the Attorney General and the State Board of Elections are precluded from taking actions in support of this unconstitutional law in this election cycle, I am certain that the -- that that will be the law. It may be appealed, it may be whatever, but that will be the law and these DAs cannot interfere with that law. They cannot take actions contrary to that. That would be the ruling of the Court.

You don't have to -- and that's really what *Voinovich* stands for, that you don't have to get everyone who could violate the law to have a ruling on the law, if you have people that satisfy the *Ex Parte Young* requirements which I submit, for the reasons we've discussed, that we do.

Your Honor, I've somewhat already covered this but to be clear, I think there is a misunderstanding of what this -- the standing argument for what the core plaintiffs are why --

why they have the need to bring this case. We are not the voters in this scenario.

The plaintiffs are not the voters. These are the people whose mission is to serve various communities in North Carolina to help people who want to vote to vote.

And so the burden on them and the reason that this law is a burden is to try to explain it and try to work with people when they have seen press reports from the last election, they've seen other stuff that causes them a very real fear of making a mistake and for exercising their right to vote they end up being convicted of a new felony.

It's the resources of our clients that are at stake. We are not standing here today representing individual voters. We are representing people who are trying to help individual voters.

Your Honor, I'll head toward the end here returning to the merits, which again there is limited discussion of with respect -- and some of it, I think, incorrectly summarized.

Plaintiffs are not proposing a preliminary injunction because they think there are facts that need to be developed. If there were, they would have sought discovery. They would have asked, perhaps, for more time to get the discovery. They would have challenged the facts. That is not what they have done here. And so for purposes at least of this hearing, maybe more, at least for this hearing, we can hear no merits

arguments on the equal protection claim.

The notion that counsel says that we need a deep factual inquiry to figure out if these laws were passed at the end of the 19th century, early 20th century with a racially discriminatory intent, I -- Your Honor, no discovery is needed for that. That is unchallengeable, which I submit to you is why they didn't challenge it.

The second element, I think counsel inadvertently misstated, is not whether there is a discriminatory intent today. It is whether there is a discriminatory impact. And the evidence of that, unchallenged, is that 60 percent of the people identified in that audit from the last presidential election cycle, 60 -- either 66 or 61, Your Honor -- I don't have it right in front of me -- were black in a state that has a much lower black population. Hugely disproportionate impact.

And then when you go to the 12 people prosecuted in one county, the four prosecuted in another, in one county four of four are black and in the other county nine of 12 are black. That is the impact; those are the statistics.

But again, Your Honor, they are not challenged here today. So for purposes of this hearing, I actually think you need to accept that there is a substantial likelihood of success on the equal protection claim and, so too, on the void for vagueness claim, Your Honor.

Counsel -- I referred to this before -- did an

excellent job stringing together, as they do in their briefs, statutes, constitution, another statute. But if you go back, Your Honor, I submit, to the transcript, and you read what counsel said the statute says -- I didn't get it precisely and I don't want to get it wrong, so I won't say that, but the statute itself doesn't say what he said it says.

The statute says that for any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary election without having been restored to the right of citizenship in due course and by the method provided by law. No intent, no anything, and the words I think we're -- we're debating are the "without having been restored the right of citizenship."

But what he said is it's whether or not you have unconditional discharge. Unconditional discharge is not in the statute. That is our point. It is not tangled, as I think he said it was. It's simply that if you have a non-standard base statute with words that do not give the reader any real sense as to what it means to violate the statute, that is a violation of the due process clause of the United States Constitution.

Your Honor, this a case being heard just 12 days before the next election. Each day that continues with these defendants being permitted to have -- continue to take actions or have the threat or the possibility of taking actions that could enforce or lead to the enforcement of this

unconstitutional statute are days that our clients, who are trying to sort this all out for people who just want to vote, are being irreparably harmed. And that's the reason we came to you for this preliminary injunction.

Thank you.

MR. STEED: Thank you, Your Honor.

First of all, I would like to clarify one thing that I did say. When you asked me about redressibility and whether every district attorney needed to be involved, I believe I did say that it would make sense to have them all involved as parties. I think the better understanding of that, because of 1983's implication of an ongoing violation, would be the actual two district attorneys who have prosecuted under this statute.

Those would be the required parties, I believe, to be able to provide a remedy that is actually useful and addresses the concerns argued in this case.

Additionally, there was -- there was argument just now that if Your Honor were to issue this order it is likely that district attorneys across the state wouldn't prosecute under this. I -- I'm not sure how strong the likelihood there is, but if a final ruling of declaratory relief were issued, then it would stop prosecution. But a preliminary injunction does not have that reach, and that is why it doesn't address their injuries because essentially their -- their injury boils down to their conversation with a voter.

They are -- they are trying to convince a voter to register and vote, and the voter is telling them they are afraid of prosecution under the statute. So if Your Honor entered the injunction as it is requested, the advice that they must give to that voter is the State Board and the AG cannot prosecute you under this crime, but you should know that the same local district attorneys, who previously did, are still free to do so.

In fact, it -- that just prevents exactly why they are not redressing the injury that they brought to the Court. This -- the injunction would not solve their problem.

There was reference to one of the exhibits that is the State Board letter of 2017 from the investigator. I would just like to point out that that was before -- and I addressed that earlier -- before the administrative change, the State Board members changed and the 2019 priorities policy was put out.

Additionally, there was an argument made about the timeliness. And I believe counsel's words were fear was still present in the people that they do outreach with after the state court decision and that's why they decided to bring this. So, essentially, that is an admission that they made a strategic choice about a fear that they knew were with people that they were working with before that case, to let that case carry itself out over the course of nine to ten months and only

when that case with different parties didn't give them the relief that they were looking for, that they decided it was time to bring their case. I don't think it argues in favor of them on timeliness or irreparable harm.

And the final point that I would like to -- or the final point that they addressed was that they -- it's their argument that the Court should read this statute in the little window of just those words without referencing any other authority.

It is our argument that *Kolbe* cited before provides the Court the ability to look at other statutes and specifically the ones that references the restoration of rights. And the fact that those two work together does not render one or the other vague.

And the last point would only be just to clarify my own argument that was raised by counsel. I did not intend to state that the late 19th century of this state was not replete with acts as other states that were full of discrimination. Our history is well-known and it is harmful and the state would not take that position, does not want that to appear to be the position of the state's case.

THE COURT: If a person reads the strict voting rights law, then turns to other statutes for further guidance, where are they to seek guidance when they reach the unconditional discharge language that they see in the statute,

13-1, the citizen's restoration statute?

MR. STEED: My understanding, Your Honor, is that it is just the plain language at that point. I don't think there is another definition of the statute on unconditional discharge in -- in the statute, that I am aware of.

THE COURT: All right.

MR. STEED: Thank you.

THE COURT: Counsel for plaintiffs, do you have evidence that the individuals who were part of the Alamance 12 and the Hoke County four reviewed or investigated the strict voting rights law prior to the 2016 election?

MR. YOUNGWOOD: Hold on a second, Your Honor. (Confers with Ms. Riggs).

If Ms. Riggs may address the Court.

MS. RIGGS: Your Honor, having represented the -- some of the Alamance 12, I can represent to you that all of our clients believed that they were eligible. That is, they did not understand reading -- and none of them are lawyers -- they did not understand from the face of the statute what unconditional discharge meant.

One client, for instance, believed she had been off probation for ten years, and it turns out she wasn't.

THE COURT: Thank you.

Is there anything else from either side?

MR. YOUNGWOOD: Your Honor, if I could just have a

minute; one second, please.

THE COURT: All right.

Do we need to -- I'll be happy to take another ten-minute recess and let y'all decide whether you need --

MR. YOUNGWOOD: Your Honor, I think you have been very generous with your time. I just -- if you don't mind, I'd cite you to two cases that just, I think, touch on some of the colloquy you had with counsel on the void for vagueness and the incorporation by reference of one statute to another where there is no actual cross-reference.

Your Honor, I would refer you to two cases that I believe are in the briefs. I'll cite them.

One is Fourth Circuit case, *Manning versus Caldwell*, 930 F.3d 264. This was a case concerning the undefined term "habitual drunkard" which was found void for vagueness in a quasi-criminal statute and involved some of the cross-reference issues that were just discussed.

And the second case is a voting case, not -- not out of the Fourth Circuit but out of the Eleventh Circuit, *Jones versus Governor of Florida*, a very recent case, 220 Westlaw 5493770. And it's notable because that court sitting en banc found that its scienter requirement is that statute has scienter requirement, unlike this one, was dispositive in not finding the statute void for vagueness.

Thank you, Your Honor.

MR. STEED: Your Honor, very quickly, I wanted to point out that 13-1, which does reference unconditional discharge, reads:

> "The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the state having jurisdiction of that person."

So it provides a little bit more detail on where they -- where they are concerned with their discharge and the conditions related to that discharge and referred to the agency that would be in control at that point as to their post-release supervision.

I also just wanted to point out that it wasn't only the defendants that made reference to 13-1. Plaintiffs' own brief made reference to 13-1.1 in their papers by referencing the unconditional discharge, and then trying to argue that that was also vague. So there's -- it's -- the argument that there can't be -- can't check with another statute to provide clarity is one that was made by all the parties. That was on page 14 of plaintiffs' brief.

THE COURT: Thank you.

All right. If that is all, we will -- I certainly understand the timing involved in all of this, but I am not in a position to make a decision and write the opinion today, but I will be doing that the first part of next week.

MR. YOUNGWOOD: Thank you very much, Your Honor.

THE COURT: You're welcome.

MR. STEED: Thank you, Your Honor.

(Proceedings end at 11:31 a.m.)

(END OF TRANSCRIPT.)

NORTH CAROLINA

GRANVILLE COUNTY

CERTIFICATION OF REPORTER

I, N. Annette P. Myers, CVR-CM-M, contract court reporter for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the forgoing is a true and correct transcript of the proceedings held in the above-entitled matter;

That the proceedings were reported by me using the voice-writing (Stenomask) method; and

That the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 26th day of October, 2020.

/s/ N. Annette P. Myers
N. Annette P. Myers, CVR-CM-M
Contract Court Reporter